

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

AMBER L. JOHNSON )

)

VS. )

W.C.C. 01-08402

)

PROVIDENCE JOURNAL COMPANY )

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the denial of her request for approval of a rehabilitation program. After review of the record and consideration of the arguments of counsel, we find no error on the part of the trial judge and, therefore, deny the appeal.

Prior to the filing of the instant petition, the employer had filed a petition to review alleging that the employee's incapacity had ended. When the employee subsequently filed this petition, the matters were consolidated for trial and decision. In this Employee's Petition to Review, the employee requested approval of a rehabilitation program proposed by Carl Barchi in his report dated October 23, 2001. The program proposed retraining as a medical office assistant through attendance at Katharine Gibbs School for nine (9) months at a cost of Twelve Thousand (\$12,000.00) Dollars. The petition was denied at the pretrial

conference and the employee claimed a trial in a timely manner. After a trial on the merits of the case, the trial judge concluded that the employee had failed to establish that the proposed program was reasonable based upon her current status. The employee then filed this appeal.

The employee has been receiving weekly benefits since July 14, 2000 pursuant to a Memorandum of Agreement dated December 4, 2000. She had previously received weekly benefits for a brief period from about June 15, 2000 to June 22, 2000 and then returned to work until July. The injury is described in the memorandum simply as "right elbow." Initially, the employee received weekly benefits for total incapacity. Pursuant to a Mutual Agreement executed by the parties, her weekly benefits were modified to those for partial incapacity as of November 28, 2000.

Ms. Johnson had been working full-time as a newspaper inserter for the Providence Journal for about seven (7) years prior to her injury. She developed right elbow pain which gradually increased until she went sought medical treatment and left work in June 2000. She attempted to return to work, but continued to have problems. She saw Dr. Gregory Austin on July 13, 2000 and he advised her to stop working. The employee again attempted to return to work in January 2001. She started out doing her regular job for only four (4) hours a day for two (2) weeks and then increased to eight (8) hours a day. She experienced difficulty particularly with the heavier material she would be required

to grasp and lift. Her right elbow symptoms increased again until she left work in April 2001.

Ms. Johnson testified that she would like to be retrained for other work and was interested in general office work. She acknowledged that she had not looked for other employment since she left the Journal in April 2001 (she testified before the court in April 2002). She stated that she was under the impression that she could not take another job until things were settled with her workers' compensation case.

Carl Barchi, a vocational rehabilitation specialist, met with the employee on one (1) occasion in October 2001. He noted that the employee had obtained her GED, but she had no transferable skills because her employment as an inserter was classified as unskilled labor. He also considered her functional limitations as described by Dr. Austin, the treating physician, and Dr. Steven N. Graff, the impartial medical examiner appointed by the court. These restrictions included no lifting in excess of three (3) pounds and no repetitive activity with her right arm.

Mr. Barchi noted in his report that the employee expressed interest in returning to school and obtaining updated computer and office practice skills so that she could work as an office assistant in a medical or legal office. He indicated that she had focused her attention on the nine (9) month program offered by the Katharine Gibbs School. Mr. Barchi concluded that this was appropriate and employment as an office assistant would be consistent with her

restrictions. He acknowledged that he never explored employment options that might be available with the employee's current skills or other potential schools offering programs in office practice skills.

The medical evidence consisted of the affidavit, reports and deposition of Dr. Gregory Austin, the deposition and report of Dr. Arnold-Peter Weiss, the deposition and report of Dr. Steven N. Graff, and the deposition and report of Dr. Harvey M. Baumann. All of the physicians are orthopedic surgeons specializing in hand and arm problems. Dr. Graff has treated the employee since July 2000, primarily with conservative measures, including physical therapy, bracing, rest, and medication. He stated that the employee continued to be partially disabled with restrictions of limited repetitive lifting and grasping with her right hand, no lifting over fifteen (15) pounds, and wearing her brace as needed. In response to questions whether the employee was capable of participating in a training program for a medical assistant position or being employed as a medical assistant, the doctor testified that without more details as to what exactly would be required in the training or the particular job he could not render an opinion with any certainty.

Dr. Weiss evaluated the employee on July 10, 2001 at the request of the insurer. His examination findings were normal and he concluded that Ms. Johnson could return to work as an inserter without restrictions.

Dr. Graff was appointed by the court to conduct an impartial medical examination in the companion case, W.C.C. No. 01-05118, an Employer's Petition

to Review, in which the employer alleged that the employee's incapacity had ended, based upon the report of Dr. Weiss. The examination took place on September 13, 2001. The findings were only somewhat consistent with lateral epicondylitis, which had been the primary diagnosis of Dr. Austin, and the most tenderness was in an adjacent area. The doctor concluded that the condition was related to the employee's work activities and he recommended a cortisone injection to assist in the diagnosis and alleviate the inflammation. Dr. Graff found that the employee was partially disabled with restrictions of no lifting in excess of three (3) pounds and no repetitive activity with the right arm.

Dr. Baumann was appointed by the Medical Advisory Board as part of an independent health care review team to evaluate the employee and the proposed rehabilitation program in accordance with the version of Rule 2.33 of the Rules of Practice of the Workers' Compensation Court in effect at the time the petition was filed. The evaluation was conducted on December 20, 2001. The doctor reviewed the reports of Dr. Austin and Dr. Graff, in addition to examining the employee. His diagnoses were cubital tunnel syndrome, question of early carpal tunnel syndrome, lateral epicondylitis, and question of radial tunnel syndrome, all involving the right elbow area.

Dr. Baumann found the employee to be partially disabled with restrictions of no lifting in excess of three (3) pounds, especially repetitively. He recommended that the employee undergo EMG and nerve conduction studies, and possibly an MRI, to better determine the nature and extent of the injury,

particularly in light of the lengthy period of elapsed time without any significant improvement. He further recommended cortisone injections, additional physical therapy and bracing.

Additional information was obtained from reports of the Dr. John E. Donley Rehabilitation Center and the reports of Cynthia J. Baldwin, a vocational rehabilitation counselor who was also appointed by the Medical Advisory Board as part of the independent health care review team. The employee was referred to the Donley Center by Dr. Austin for a functional capacity evaluation and vocational evaluation. The functional capacity evaluation was performed by Lisa Stanford, a physical therapist, on October 24, 2001 and November 5, 2001. The report concluded that the employee was unable to return to her former position as an inserter because it required constant grasping and lifting of material weighing between four (4) and twenty-seven (27) pounds. The employee was only capable of lifting five (5) to fifteen (15) pounds frequently and had restrictions on grasping and other hand movements with her right upper extremity.

The vocational evaluation at the Donley Center was done by Jean Mandell, a vocational rehabilitation counselor, on November 9, 2001 and November 19, 2001. Ms. Mandell noted the employee's functional limitations and further noted that the employee preferred to work the third shift because she has three (3) young children (ages 9, 8, and 3) and her husband would be home in the evening to care for them. Ms. Mandell indicated that childcare issues would affect Ms. Johnson's ability to participate in vocational services, as well as limit the type of

employment she could accept. However, she recommended that the employee take a test to further identify occupations of interest and then services would be focused on direct job placement in a new job with a new employer utilizing her existing skills.

Ms. Baldwin evaluated the employee on January 7, 2002 at the request of the Medical Advisory Board. She also reviewed the reports of Dr. Baumann and Dr. Austin. She concluded that the proposal to pursue clerical training did not seem appropriate in light of the employee's condition because the training would likely include extended periods of repetitive activity with her right arm, such as for keyboard and word processing training. In addition, even if the employee was found capable of participating in this type of training, the cost of the proposed program is excessive. Ms. Baldwin recommended that the employee undergo additional vocational testing to find other occupations of interest and that job placement services should then be initiated. She noted various agencies that provided testing and other vocational services free of charge or at reasonable cost and also other programs offering clerical training at less cost than the Katharine Gibbs School.

The trial judge found that the opinions of Dr. Austin, Dr. Graff and Dr. Baumann outweighed the opinion of Dr. Weiss and, therefore, the employee remained partially disabled due to the effects of the work injury to her right elbow. Consequently, he denied the Employer's Petition to Review in the

companion case, W.C.C. No. 01-05118. The employee claimed an appeal in that matter, but then subsequently withdrew it.

With regard to the request to approve the rehabilitation program proposed by Mr. Barchi for participation in a nine (9) month office assistant training program at a cost of Twelve Thousand (\$12,000.00) Dollars, the trial judge rejected the testimony and opinions of Mr. Barchi and found that the proposed program was not reasonable in light of the employee's current condition. He found the opinions expressed by Dr. Baumann, Jean Mandell of the Donley Center, and Cynthia Baldwin to be more persuasive.

The employee has filed three (3) reasons of appeal which basically contend that the trial judge was obligated to approve the proposed rehabilitation plan because he found that the employee was unable to return to her former employment. The employee further argues that the trial judge erred in rejecting the opinions of Carl Barchi. We find no merit in the employee's appeal.

The findings of fact made by the trial judge are entitled to great weight on appeal. Absent a determination that a finding on a factual matter is clearly erroneous, the findings of fact made at the trial level are final. R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996).

Section 28-33-41 of the Rhode Island General Laws sets forth the process for approval of a rehabilitation plan. The expressed goal of rehabilitation is to "restore an employee who is occupationally disabled as nearly as possible to his or her pre-injury status." R.I.G.L. § 28-33-41(a)(2). The statute further provides

guidelines for the court to follow when considering a request for rehabilitative services.

“Action shall be taken that, in the judgment of the workers’ compensation court, seems practicable and likely to speed the recovery and rehabilitation of injured workers; provided, that rehabilitative services are appropriate to the needs and capabilities of injured workers.” R.I.G.L. § 28-33-41(b)(2).

The employee in this matter requested the court’s approval of a specific educational program at a specific institution. The employee had never previously participated in any type of vocational services. There had been no attempts to find other types of employment that would not require additional schooling. Questions remained as to whether the employee’s condition had really reached an endpoint in terms of improvement. Questions also were raised and not answered as to whether the employee would be physically capable of undergoing the training that was requested, particularly because it could involve more repetitive activity than might be required in an office clerical position.

The trial judge was presented with conflicting expert opinions as to the appropriateness of the program at Katharine Gibbs School at this particular time. Considering the factors noted above, he chose to rely on the opinion of Cynthia Baldwin, that the employee should explore certain other options before embarking on a course of retraining. If the job search proved unsuccessful, then other programs were available offering schooling in office practices or clerical work. Such a choice between conflicting opinions is well within the discretion of the trial judge. Parenteau v. Zimmerman Eng. Co., 111 R.I. 68, 299 A.2d 168

(1973). The trial judge explained the reasons for his rejection of Mr. Barchi's opinion and his acceptance of the opinions of Ms. Baldwin, which were also consistent with the Donley Center evaluation. We find no abuse of that discretion as the opinions of Ms. Baldwin are well supported by the evidence in the record.

The employee argues that the trial judge is mandated by the statute to order some type of rehabilitation plan when it is determined that the employee cannot return to her former employment. Certainly the statute promotes the provision of rehabilitative services in order to return injured workers to gainful employment. In this case, the trial judge did not find that the employee was not eligible or entitled to any rehabilitative services at all. He merely concluded that this particular plan as proposed by Mr. Barchi was not practicable, nor appropriate to the needs and capabilities of the employee at this time. The employee is not precluded in any way from obtaining other vocational services. If the insurer is unwilling to agree to an alternative plan, the employee is free to petition the court for approval. It is not the duty of the trial judge to formulate a plan for the employee.

Based upon the foregoing, we find that the trial judge was not clearly wrong in his findings of fact and we, therefore, deny the employee's appeal.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Sowa and Connor, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

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Connor, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on October 15, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this        day of

BY ORDER:

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ENTER:

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Olsson, J.

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Sowa, J.

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Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and  
Michael T. Wallor, Esq., on

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